Ng Ah Ba & Ors v Ramanda Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-8 OF 1994
SHAIK DAUD, GOPAL SRI RAM AND VC GEORGE JJCA
9 JANUARY, 30 MAY, 16 JUNE 1995

Civil Procedure *— Summary judgment — Specific performance — Agreement relating to land — Mere general allegation of conspiracy — Whether triable issue raised — Rules of the High Court 1980 O 81*

Civil Procedure *— Summary judgment — Affidavits — Application for specific performance — Agreement relating to land — Allegation of conspiracy by defendants — Whether affidavits must condescend to particulars — Rules of the High Court 1980 O 81*

The first to the fourth appellants, who were also the shareholders and directors of the fifth appellant company, entered into a sale and purchase agreement ('the first agreement') to purchase a piece of land in Seberang Perai ('the land') from its beneficial owners. The first agreement contained a nomination clause which required the beneficial owners to transfer the land to any person nominated by the former. Meanwhile, the first to the fourth appellants entered into another sale and purchase agreement ('the second agreement') to sell the land for the sum of RM3,253,966.85 to the respondent. Later, pursuant to the nomination clause in the first agreement, the land was transferred in favour of the fifth appellant company. A fresh agreement ('the third agreement') was then entered into between the appellants and the respondent, whereby the fifth appellant company undertook to execute a valid and registrable memorandum of transfer in favour of the respondent, provided that the respondent was not in breach of any of its obligations under the second agreement. Having fulfilled its obligations, the respondent later called for a transfer in its favour. However, the fifth appellant company, who had defaulted under the first agreement, was unable to do so. The respondent brought summary proceedings for specific performance of the second agreement against the appellants, pursuant to O 81 of the Rules of the High Court 1980 ('the RHC'). The trial judge held that there was no triable issue and granted a summary judgment to the respondent. The second, third and fifth appellants appealed on the grounds that the trial judge had failed to consider the evidence of a possible conspiracy between the respondent's manager, the first appellant, and the appellants' solicitors, in that the actual purchase price of the land which was RM4.8m, was concealed from them.

Held, dismissing the appeal:

(1) (Per **Shaik Daud JCA**) If a defendant in an application for summary judgment under O 81 of the RHC could show that there is a triable issue or that there ought for some other reasons

to be a trial of the action, the judge ought to dismiss the plaintiff's application and grant the defendant leave to defend (see p 69D–E).

(2) (Per **Shaik Daud JCA**) In this case, however, the trial judge was right in rejecting the averment of conspiracy as an issue to be tried, as being unreasonable and unfounded. The second agreement clearly expressed that the purchase price of the land to be RM3,253,966.85, and this was admitted by three of the appellants in their statement of defence. The third appellant had also affirmed in his affidavit that the original purchase price of RM4.8m was reduced to RM3,253,966.85 after negotiation. In the light of the admissions, it was clear that the appellants knew all along that the purchase price was in fact reduced (see pp 69I and 70A–D).

(3) (Per **Shaik Daud JCA**) In fraud cases, it is clear that the party making allegations of fraud is required to condescend to particular, and that a mere general allegation of fraud is not sufficient. This principle applies equally to cases involving allegations of conspiracy. The appellants in this case had merely made sweeping and general allegations of conspiracy without alluding to any particulars. Thus, what the appellants succeeded in raising, at best, was a mere suspicion, which was certainly not sufficient (see pp 70I and 71A–E) *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1 and *See Hua Daily News Bhd v Tan Thein Chin & Ors* [1986] 2 MLJ 107 followed.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400
Cannock Chase District Council v Kelly [1978] 1 All ER 152; [1978] 1 WLR 1
See Hua Daily News Bhd v Tan Thein Chin & Ors [1986] 2 MLJ 107

(4) (Per **Gopal Sri Ram JCA**) Viewed against the background of the events that transpired prior to the execution of the second agreement, the documents relied upon by the appellants did not lend any assurance whatsoever to the charge of conspiracy made by them (see p 77F).

(5) (Per **Gopal Sri Ram JCA**) The rule relating to the pleading has to be observed strictly, even in cases coming within the summary procedure. In this case, neither the defence nor the affidavit of the appellants contained any particulars of the alleged fraud or conspiracy. Though it was of no consequence that the defence did not condescend to particulars, as this was an application under the summary jurisdiction, and thus there was no obligation on the part of the appellants to deliver a defence, the affidavit, however, must do so (see p 77H) *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1 and *See Hua Daily News Bhd v Tan Thien Chin* [1986] 2 MLJ 107 followed.

(6) (Per **Gopal Sri Ram JCA**) There was a clear admission in the appellant's defence that the price asked for was RM4.8m and that it had been negotiated down to RM3,253,966.85. It was clear that one could not have a conspiracy in the face of that admission. The contradiction between some parts of the appellants' defence and affidavit also demonstrated the lack of bona fides on the part of the appellants when they alleged that there was a conspiracy (see p 78C–D).

(7) (Per **Gopal Sri Ram JCA**) On the totality of all the evidence, it could be concluded that the allegation of a conspiracy to defraud was frivolous and made without any basis. It must be remembered that taking a plea of fraud is a serious matter and that no such plea ought to be put on the record in the absence of sufficient material in support. The judge was entirely correct in his decision that there was no triable issue nor any other reason for a trial (see pp 78E–F).

Cases referred to

Cannock Chase District Council v Kelly [1978] 1 All ER 152; [1978] 1 WLR 1

Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd [1990] 3 MLJ 1

Miles v Bull [1969] 1 QB 258; [1968] 3 All ER 632; [1968] 3 WLR 1090

See Hua Daily News Bhd v Tan Thien Chin [1986] 2 MLJ 107

[Bahasa Malaysia summary

Perayu pertama hingga keempat, yang juga merupakan pemegang saham dan pengarah di syarikat perayu kelima, telah mengikat suatu perjanjian jual beli ('perjanjian pertama') untuk membeli sebidang tanah di Seberang Perai ('tanah tersebut') dari pemunya benefisialnya. Perjanjian pertama mempunyai suatu fasal perlantikan yang menghendaki pemunya benefisial untuk memindahmilik tanah tersebut kepada sesiapa yang dilantik oleh perayu pertama hingga keempat. Sementara itu, perayu pertama hingga keempat telah mengikat satu lagi perjanjian jual beli ('perjanjian kedua') untuk menjual tanah tersebut kepada penentang, untuk jumlah RM3,253,966.85. Selepas itu, mengikut fasal perlantikan di bawah perjanjian pertama, tanah tersebut telah dipindahmilik kepada syarikat perayu kelima. Suatu perjanjian baru ('perjanjian ketiga') kemudiannya telah diikat antara perayu dengan penentang, di mana syarikat perayu kelima telah mengakujanji bahawa ia akan menyempurnakan suatu memorandum pindahmilik yang sah dan boleh didaftar yang memihak kepada penentang, tertakluk kepada syarat bahawa penentang tidak memungkiri obligasinya di bawah perjanjian kedua. Selepas memenuhi obligasinya, penentang kemudiannya pun meminta supaya pindahmilik dilaksanakan. Walau bagaimanapun, syarikat perayu kelima, yang telah ingkar di bawah perjanjian pertama, tidak dapat

berbuat demikian. Penentang memulakan prosiding terus untuk pelaksanaan spesifik perjanjian kedua terhadap perayu, mengikut A 81 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim perbicaraan memutuskan bahawa tidak terdapat isu yang boleh dibicarakan lalu memberikan penghakiman terus kepada penentang. Perayu kedua, ketiga dan kelima merayu atas alasan bahawa hakim perbicaraan telah gagal mempertimbangkan keterangan bahawa adalah mungkin suatu komplot telah berlaku antara pengurus penentang, perayu pertama dengan peguam perayu, di mana harga sebenar tanah tersebut iaitu RM4.8 juta, telah disembunyikan daripada mereka.

Diputuskan, menolak rayuan itu:

(1) (Oleh **Shaik Daud HMR**) Jika defendan dalam suatu permohonan untuk penghakiman terus di bawah A 81 KMT boleh menunjukkan bahawa terdapat suatu isu yang boleh dibicarakan atau perbicaraan harus diadakan atas suatu sebab, hakim harus menolak permohonan plaintif dan memberikan defendan kebenaran untuk membuat pembelaan (lihat ms 69D–E).

(2) (Oleh **Shaik Daud HMR**) Dalam kes ini, walau bagaimanapun, hakim perbicaraan adalah betul dalam menolak pengataan komplot sebagai suatu isu yang boleh dibicarakan, atas alasan bahawa pengataan itu adalah tidak wajar dan tidak berasas. Perjanjian kedua jelas mengatakan bahawa harga belian tanah tersebut ialah RM3,253,966.85, dan ini telah diakui oleh tiga orang perayu yang berkenaan dalam pernyataan pembelaan mereka. Perayu ketiga juga telah mengaku dalam afidavitnya bahawa harga belian asal sejumlah 4.8 juta, telahpun dikurangkan kepada RM3,253,966.85 selepas perundingan. Akibat pengakuan ini, adalah jelas bahawa perayu mengetahui bahawa harga belian telah dikurangkan selama ini (lihat ms 69I dan 78D).

(3) (Oleh **Shaik Daud HMR**) Dalam kes yang melibatkan fraud, pihak yang membuat pengataan tersebut harus membutirkannya, dan suatu pengataan am mengenai fraud semata-mata adalah tidak mencukupi. Prinsip ini adalah juga terpakai dalam kes yang melibatkan komplot. Perayu dalam kes ini hanya membuat pengataan umum tentang komplot, tanpa menyebut sebarang butir sama sekali. Apa yang perayu berjaya membangkitkan, ialah kesangsian semata-mata, yang memang tidak mencukupi (lihat ms 70I dan 71A–E) *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1 dan *See Hua Daily News Bhd v Tan Thein Chin & Ors* [1986] 2 MLJ 107 diikut.

(4) (Oleh **Gopal Sri Ram HMR**) Dengan mengambil kira latar belakang peristiwa yang berlaku sebelum penyempurnaan perjanjian kedua, dokumentar yang perayu bergantung kepada tidak memberikan apa-apa kepastian terhadap pertuduhan berkomplot yang dibuat oleh mereka (lihat ms 77F).

(5) (Oleh **Gopal Sri Ram HMR**) Peraturan berkenaan dengan pliding harus diikuti dengan ketat, walaupun dalam kes yang melibatkan prosedur terus. Dalam kes ini, tidak terdapat sebarang butir mengenai pengataan fraud atau komplot dalam pembelaan ataupun affidavit perayu. Walaupun tidak terdapat apa-apa akibat jika pembelaan tidak memberikan butir-butir, kerana permohonan ini adalah di bawah bidang kuasa terus, dan maka tidak terdapat apa-apa obligasi atas perayu untuk mengemukakan pembelaan, tetapi, afidavit harus berbuat demikian (lihat ms 77H) *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1 dan *See Hua Daily News Bhd v Tan Thein Chin & Ors* [1986] 2 MLJ 107 diikut.

(6) (Oleh **Gopal Sri Ram HMR**) Terdapat pengakuan yang jelas dalam pembelaan perayu bahawa harga yang diminta ialah RM4.8 juta dan ia telah dikurangkan kepada RM3,253,966.85 selepas perundingan. Adalah jelas bahawa tidak terdapat komplot memandangkan pengakuan tersebut. Percanggahan dalam sebahagian daripada pembelaan dan afidavit perayu juga menggambarkan bahawa perayu tidak bona fide dalam pengataan mereka bahawa terdapat komplot (lihat ms 78C).

(7) (Oleh **Gopal Sri Ram HMR**) Secara keseluruhan, selepas mempertimbangan kesemua bukti, boleh diputuskan bahawa pengataan komplot untuk menipu tersebut adalah remeh dan tanpa asas. Haruslah diingatkan bahawa pengataan fraud adalah suatu perkara yang serius, dan tidak boleh diletakkan dalam rekod, jika tidak terdapat material yang mencukupi untuk menyokongnya. Hakim adalah betul belaka dalam memutuskan bahawa tidak terdapat isu yang boleh dibicarakan atau sebarang sebab untul perbicaraan (lihat ms 78E–F).]

[*Editorial note*: The appellants have appealed to the Federal Court vide Civil Appeal No 08–1–95.]

Notes

For cases on summary judgments, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520.

Complete list of cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400

Cannock Chase District Council v Kelly [1978] 1 All ER 152; [1978] 1 WLR 1

Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd [1990] 3 MLJ 1

Miles v Bull [1969] 1 QB 258; [1968] 3 All ER 632; [1968] 3 WLR 1090

See Hua Daily News Bhd v Tan Thien Chin [1986] 2 MLJ 107

Legislation referred to

Rules of High Court 1980 O 14, O 81

Appeal from: Civil Suit No 22–49–93 (High Court, Pulau Pinang)

RJ Manecksha (*Ong & Manecksha*) for the appellants.

Gan Teik Chee (*Ramsun Ho* with him) (*Gan Teik Chee & Ho*) for the respondent.

Cur Adv Vult

9 January 1995

Shaik Daud JCA: This is an appeal by the second, third and fifth defendants in the court below (now the appellants) from an order of the Penang High Court entering summary judgment for specific performance pursuant to O 81 of the Rules of the High Court 1980 ('the RHC'). At the outset, it may be pertinent to state that there are in fact two transactions in this matter. In the first transaction, the first to fifth appellants purchased a piece of land in Seberang Perai Tengah from the beneficial owners of the land in question. This transaction in fact is a subject of another proceeding which is not concerned in this appeal. In the second transaction, the plaintiff (now the respondent), ie Ramanda Sdn Bhd, purchased a portion of the said land from the first to fourth defendants, who are also the shareholders and directors of the fifth appellant, which is a company formed for the sole purpose of receiving the transfer of the land in the first transaction.

According to the statement of claim, on 4 November 1991, a written agreement, which I will refer to as the first agreement, was entered into between the first to the fourth defendants. In this first agreement, the defendants agreed to sell the land in question to the plaintiff for a sum of RM3,253,966.85. Before this, on 24 May 1991, the plaintiff had paid to its solicitors 10% of the purchase price, ie RM325,396.70, to be paid to the first to fourth defendants after the first agreement had been signed. Be that as it may, the 10% was in fact paid to the defendants even before the first agreement was signed, on the request of the first defendant and on the undertaking given that the sum paid shall be refunded if the first agreement for some reason or other is not signed.

The relevant terms which need be noted in the first agreement are as follows:

(a) a sum of RM650,793.36, which is 20% purchase price, had to be paid by the plaintiff to the defendants' solicitors as stakeholder within three months of the date of the first agreement, and the plaintiff had in fact fulfilled this term;

(b) the sum of RM650,793.36 should only be released to the defendants by their solicitors after the plaintiff had received from the defendants a letter of approval from the authorities pertaining to zoning of the land to industrial;

(c) the balance of purchase price, ie RM2,227,776.79, is to be paid to the defendants within six months from the date of the receipt of the letter of approval pertaining to zoning of the land to industrial; A

(d) the defendants are required to hand over vacant possession of the land on the receipt of the final balance of the purchase price;

(e) the plaintiff is entitled to specific performance of the first agreement; and B

(f) time wherever mentioned is of the essence.

Pursuant to the above-mentioned terms, the defendants' solicitors informed the plaintiff's solicitors by facsimile dated 26 June 1992, that the authorities had approved the zoning of the said land to industrial. Following this, the date for the completion of the sale would be 26 December 1992. On the receipt of the letter of approval, a sum of RM650,798.36 was released to the defendants by their solicitors. Upon nearing the completion date of the first agreement, the land in question was transferred to the fifth defendant, and as a result, a novation agreement had to be entered into in order to complete the sale of the land to the plaintiff and also to enable the plaintiff to arrange for its loan before the plaintiff could release the balance of the purchase price. As a result of this, the completion date of the first agreement had to be postponed. C D

According to the plaintiff, only one additional agreement was in fact made, and that is one dated 7 April 1993, and the relevant terms are: E

(a) that this was to be additional to the first agreement;

(b) that the fifth defendant is to execute a valid transfer capable of being registered to the plaintiffs when required by the first to the fourth defendants; F

(c) that the first to fourth defendants undertook to direct the fifth defendants to execute a valid transfer capable of being registered to the plaintiff, upon the plaintiff complying all the terms of the first agreement; and

(d) that the fifth defendant confirm and agree that all payments including the purchase price which plaintiffs had to pay under the first agreement be paid to the first to fourth defendants. G

The plaintiff, on its part, had complied with the terms of the first agreement, but when it came time for the sale and purchase to be completed, the fifth defendant defaulted. The plaintiff accordingly issued a writ and moved a summons for summary judgment. H

The second, third and fifth defendants filed their statement of defence wherein they admitted that the fifth defendant is the registered owner of the said land, and that the first to fourth defendants are the shareholders and directors of the fifth defendant. They also admitted that the first agreement dated 4 November 1991, was entered into between the plaintiff and the first to fourth defendants. They, however, averred that the original purchase price was RM4.8m, but after negotiations, it was reduced to RM3,253,966.85. They, however, also averred that there was a conspiracy I

between the manager of the plaintiff, the first defendant, and the solicitors for the defendants, whereby the true price of the land which was in excess of RM4m was concealed from the second, third, fourth and fifth defendants. It would appear that the difference in the purchase price would be shared between them.

This, in fact is their main defence. In their memorandum of appeal, they averred that the learned judge of the High Court failed to consider the evidence of a possible conspiracy. Being an application for a summary judgment under O 81 of the RHC, the learned judge, after considering the contents of all the affidavits and after hearing submissions, came to the conclusion that there were no triable issues as there was no evidence to show the allegation of the so-called conspiracy, and he was also of the view that there were no other reasons for the matter to go to trial and consequently, he ordered specific performance and costs, and also ordered an inquiry as to damages.

Now, being an application for summary judgment under O 81, which is a procedure similar to O 14, the defendant need only to show that there is a triable issue or that there ought for some other reasons to be a trial of the action. As mentioned earlier, the second, third and fifth defendants' main defence to the plaintiff's application for summary judgment is the allegation of the conspiracy. It goes without saying that if they succeed on this, the learned judge ought to have dismissed the plaintiff's application and grant them leave to defend. In this case, the learned judge came to the conclusion that the mere allegation of conspiracy was not sufficient for him to order a trial, and in fact he came to his finding, based as it were, on the affidavits and contemporary documents that there was no conspiracy as alleged. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, which was relied upon by the learned judge, the Supreme Court held at p 408:

> Under an O 14 application, the duty of the judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. ... unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

In order to appreciate the learned judge's refusal to accept the allegation of a possible conspiracy as asserted to by the second, third and fifth defendants, it is, I think, quite pertinent to consider the chronology of events which led to the writ being filed.

When the first agreement was signed on 4 November 1991, it was also signed by the second, third and fifth defendants, and the said agreement clearly and unequivocally expressed that the purchase price of the land to be RM3,253,966.85 and this was admitted to by the three of them in their statements of defence. In their statements of defence, they also admitted that originally the purchase price was RM4.8m, and after negotiation, it was reduced to RM3,253,966.85. Then, over a year later, the same three

defendants signed the additional agreement on 7 April 1993, which agreement confirmed the first agreement signed on 4 November 1991. In an affidavit sworn to the third defendant at para 24.1 and 24.2, he affirmed and admitted that the original purchase price was RM4.8m, but after negotiations with the plaintiff, the purchase price was reduced to RM3,253,966.85. Therefore, in the light of the clear admission, it seems strange that they now say that the actual purchase price was concealed from them. Where, therefore, is the concealment? They knew all along that the purchase price was in fact reduced. Neither one of them raised this issue of the possible conspiracy in any of the various correspondence between solicitors. Then, out of the blue and after having admitted that they knew the purchase price had been reduced, they in 1994 raised this issue. In their defence, they also raise the issue that the balance in the actual purchase price and the concealed purchase price would be shared between the so-called conspirators. This averment makes no sense as the first agreement merely states that the purchase price is RM3,253,966.85 and the defendants knew that the purchaser will pay that amount, and they could also receive that same amount, therefore, from where is the difference in the amount coming? In the light of this, that learned judge was right in rejecting this averment as an issue to be tried, as being unreasonable and unfounded.

The defendants appear to rely on two receipts for a sum of RM244,000 being 5% of the original purchase price, one issued by one Maikal Yasu dated 29 May 1990, and one issued by Messrs Cheong Wai Meng for RM178,573.35 dated 24 May 1991 being part of the second 5% of the purchase price. These two receipts had been sufficiently explained in the affidavit of the first defendant affirmed on 9 June 1994, and has also been sufficiently considered by the learned judge in his grounds of judgment.

Based on the evidence both in affidavits and documentary, the learned judge made a specific finding that there was no basis for the matter to go for trial. I am entirely in agreement with that finding. This court ,sitting in an appellate capacity, can find no reason to interfere with that finding. One aspect of the matter appears not to have been considered by the learned judge, but in the light of his finding, it makes no difference, and that is the question of general allegations of conspiracy advanced by the defendants. On my perusal of the statement of defence, it seems that the defendant merely made a bare and general allegation of the conspiracy. In the statement of defence, they claimed that the so-called conspiracy was entered into between the manager of the plaintiff, the first defendant and one Mr Cheong Wai Meng. Neither the name nor the identity of the plaintiff's manager has been disclosed in their affidavits-in-reply, nor has it been revealed the role played by the manager. Most important of all, I find that no particulars of the alleged conspiracy has been disclosed in their affidavits. The first defendant in his affidavit had categorically denied the allegation of conspiracy, and has sufficiently explained the circumstances heavily relied upon by the defendants in support of their allegation, which explanation found favour with the learned judge. What the defendants sort to do was merely make sweeping and general allegations of the alleged conspiracy without alluding to any particulars. The authorities are clear on

general allegations of fraud, and they are equally applicable to such allegations of conspiracy. In *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1, in considering an allegation of bad faith on the part of a local authority by a tenant of its house who had been given a notice to quit, the Court of Appeal held that [1978] 1 WLR 1 at p 6:

> If a charge of bad faith is made against a local authority, they are entitled ... to have it properly particularized. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularized, the pleading may be struck out.

This principle should apply with greater force in cases of allegations of a conspiracy or fraud. In *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, the Supreme Court in considering allegations of fraud, held that 'the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal'. It seems clear that on the authorities, a mere general allegation of fraud is not sufficient, and the party making the allegation is required to condescend to particulars. The same principle applies to allegations of conspiracy. After giving my serious consideration, I am of the view that what the defendants succeeded in raising at best is a mere suspicion, and this certainly is not sufficient. The learned judge was, therefore, right in ordering summary judgment, and I find no merits in the present appeal and, therefore, dismissed it with costs here and in the court below.

30 May 1995

Gopal Sri Ram JCA: The appellants before us are the second, third and fifth defendants in the court below: the other defendants have not appealed. The appeal is directed against an order made in open court on 6 July 1994, decreeing specific performance of an agreement dated 4 November 1991. The order appealed against was granted summarily against all defendants pursuant to O 81 of the Rules of the High Court 1980. Earlier, when the respondent's summons for judgment was heard in chambers, the learned judge had granted leave to defend without condition. However, in accordance with the procedure which was then in force, the judge entertained an application by the respondent (the plaintiff in the court below) for further argument, and, having heard such argument, reversed his decision made in chambers and made an order in terms of the summons. We heard and dismissed this appeal on 9 January 1995. I now hand down my reasons for the decision reached.

Now, it is necessary to have a clear understanding of the history and background to the dispute between the parties in order to appreciate the conclusions arrived at by the learned judge and his reasons for them. In this judgment, I shall interchangably refer to the parties in accordance with the title assigned to each of them in the suit or as they appear before this court, as convenience dictates.

The land which is the subject matter of the present litigation is known as Holding No 1152, Mukim 14, Seberang Perai Tengah, Penang ('the said land'). It was one of four parcels owned by two co-proprietors.

The first to the fourth defendants entered into negotiations with the co-proprietors to purchase all four parcels. At about the same time, the first defendant entered into negotiations to sell the said land to the plaintiff. The price was agreed at RM4.8m. Ng Kim Lim, the managing director of the plaintiff paid a sum of RM244,000 as 5% deposit towards the purchase price. He paid it to Mr Maikal Yasu, the solicitor who was then acting for the matter on instructions given to him by the first defendant. He got a receipt for it in his name. That receipt is dated 29 May 1990, and it is one of the documents which has featured prominently in the case.

On the same day, ie 29 May 1990, Mr Maikal Yasu wrote to Ng Kim Lim, in which he said that he was acting for the first defendant as the vendor of the said land. It is a very long letter, and I do not propose to reproduce it here. Suffice to say that it sets out, in some detail, the terms and conditions of the sale. This sale, however, did not materialize. Later, the parties renegotiated the sale, and entered into a formal written sale and purchase agreement. It is dated 4 November 1991, and I shall refer to it as 'the first agreement'. According to the plaintiff, the parties agreed to reduce the price from RM4.8m to RM3,253,966.85. This figure was arrived at on the basis that each square foot of the said land cost RM3.20. This state of affairs is confirmed by the affidavit affirmed by the first defendant on 9 June 1994, and filed by him on his own behalf and on behalf of the fourth defendant.

Recitals 6 and 7 of the first agreement which set out the process by which the first to the fourth defendants acquired the said land read as follows:

> 6 By a sale and purchase agreement dated 27 August 1991 (a copy of which is annexed hereto and marked 'A'), made between the said personal representatives of the one part and the vendor [being a collective reference to the first to the fourth defendants] of the other part, the said personal representatives agreed to sell and the vendor agreed to purchase their respective undivided share of the said property subject to the terms and conditions contained therein.
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> 7 By a sale and purchase agreement dated 15 October 1991 (a copy of which is annexed hereto and marked 'B'), made between the said registered proprietor, the said administratrix and the said beneficiaries of the one part and the vendor of the other part, the said registered proprietor, the said administratrix and the said beneficiaries agreed to sell and the vendor agreed to purchase their respective undivided share of the said property subject to the terms and conditions contained therein.

The first agreement also made provision for separate representation; Messrs Cheong Wai Meng & Van Buerle were solicitors for the defendants, while Messrs Ronald Chee & Associates were to act for the plaintiff. As it transpired, Mr Cheong Wai Meng played a role that seems to have placed him in a position where his personal interest appears to have conflicted with his professional duties. But that is a matter which, as will appear later, has no bearing upon the respondent's claim for specific performance.

A Each agreement which the four defendants had with the previous co-proprietors contained a nomination clause which required the co-proprietors to transfer the land to any person nominated by the former. Pursuant to that clause, the said land was transferred to and registered in the name of a private limited company (the third appellant, who was the fifth defendant in the court below) in which the first to the fourth defendants B took shares. They are also its directors.

Clause 2 of the first agreement provided for the balance of the purchase price amounting to RM2,928,570.15 to be paid in the following manner:

C (1) a sum of RM650,793.36, that is 20% of the purchase price, was to be paid to the defendants' solicitors within three months from the date of the first agreement. That sum was to be held by them on a monthly renewable fixed deposit until receipt of a letter from the relevant authority approving the said land for industrial use. Upon receipt of that letter, this sum was to be released to the defendants; D and

(2) a sum of RM2,277,776.79 being the remaining 70% of the purchase price within six months from the date of receipt by the plaintiff's solicitors of the letter of approval mentioned in the preceding sub-paragraph.

E The first agreement also contained a provision relating to the delivery of vacant possession upon the payment of the balance of the purchase price. And there was the usual stipulation making time of the essence.

On 26 June 1992, the defendants' solicitors wrote to the plaintiff's solicitors informing them that the relevant local authority had approved F the re-zoning of the said land for industrial use. Acting in accordance with the terms of the agreement, the defendants' solicitors released the sum representing 20% of the price to their clients.

I have already made mention of the registration of the said land in the fifth defendant's name. This probably took place on 10 October 1992, G because that is the date on which the transfers in favour of the fifth defendant company were presented to the registering authority. In consequence, on 7 April 1993, a fresh agreement ('the second agreement') was entered into between the defendants of the one part and the plaintiff of the other part. The judge called it a 'novation agreement', although, having read that document, I am not at all sure if that is an accurate H description.

By the terms of the second agreement, the fifth defendant company in effect bound itself to the several obligations of the vendors under the first agreement. It also undertook to execute a valid and registrable memorandum of transfer in the plaintiff's favour, provided that the plaintiff I was not in breach of any of its obligations under the first agreement.

The plaintiff, having fulfilled all its obligations, called for a transfer in its favour. It received a response from the defendants' solicitors to the

effect that there were disputes among the directors of the fifth defendant, and as such, completion would be delayed. The plaintiff then issued writ on 15 December 1993, and took out the summons to which I have made reference earlier in this judgment.

The first and fourth defendants did not resist the plaintiff's application. Instead, as I had earlier observed, they, through their solicitors, delivered an affidavit verifying the events as deposed to by the plaintiff's general manager, Mr Eng Hooi Hwa in support of the summons for judgment.

The second, third and fifth defendants delivered a defence alleging a conspiracy to defraud. The main thrust of their case lies in paras 4 and 5 of their defence, which, by reason of the criticism levelled against the learned judge, I shall reproduce in full. They read as follows:

> 4 With reference to para 8 of the statement of claim, these defendants state as follows:
>
> 4.1 the agreement dated 4 November 1991, was entered into between the plaintiffs of the one part and the first three defendants of the other part;
>
> 4.2 the purchase price mentioned therein was stated as RM3,253,966.85, after negotiations held with the plaintiffs to reduce it from the original demand price of RM4.88m; and
>
> 4.3 sometime after the main agreement and supplemental agreement referred to in para 15 of the statement of claim were signed and the property registered in the name of the fifth-named defendants, the second and third named defendants became aware that a conspiracy was entered into between the manager of the plaintiffs, the first-named defendant and Mr Cheong Wai Meng, a partner in the firm of Messrs Cheong Wai Meng & Van Buerle, then solicitors for the defendants, to conceal from the second and third named defendants the fact that in fact the purchase price was RM4.88m as originally demanded and that the difference between the aforestated sums would be paid to and be divided between the three said persons.
>
> Evidence of such conspiracy appears from the following:
>
> (i) receipt No 156 dated 29 May 1990 issued by Mr Maikal Yasu, Advocate and Solicitor, Penang, to Mr Ng Kim Lim, managing director of the plaintiffs, via Public Bank Bhd cheque No 824161 for RM244,000 being 5% of the purchase price;
>
> (ii) receipt No 23033 dated 24 May 1991, from Messrs Cheong Wai Meng & Van Buerle, Advocates and Solicitors, Penang, to the plaintiffs for RM178,573.35 being part of the second 5% of the purchase price; and
>
> (iii) receipt No 23032 dated 24 May 1991 from Messrs Cheong Wai Meng & Van Buerle to the plaintiffs for RM81,396.70 via Public Bank Bhd cheque No 475432 being part of the second 5% of the purchase price, with interest.
>
> 5 These defendants have no knowledge of the said sum of RM325,396.70 or any sum at all being paid, as alleged, towards the purchase price and state that if the said sum had been paid to the first-named defendant, as alleged, the first-named defendant had not accounted to these defendants for the same.

A It is now necessary to refer to the relevant paragraphs of the affidavit affirmed by the second defendant in opposition to the summons for judgment. They read as follows:

> 4 I refer to the defence filed herein on behalf of myself and the other defendants referred to in para 2 above, and reiterate what is stated in
B para 4 thereof.
>
> 5 In particular, I reiterate that Tang Yeam Soon, the third-named defendant and I became aware that a conspiracy was entered into between the manager of the plaintiff, the first-named defendant and Mr Cheong Wai Meng, a partner in the firm of Messrs Cheong Wai Meng & Van Buerle, the then solicitors for the defendants, to conceal from
C the third defendant and myself that in fact the actual purchase price was RM4.88m and not RM3,253,966.85 which is a peculiar sum for the purchase price.
>
> 6 I now annex herewith a receipt No 156 dated 29 May 1990, issued by Maikal Yasu acknowledging payment to him of the sum of RM244,000 being 5% of the purchase price from one Ng Kim Lin who is the
D managing director of the plaintiffs. The sum referred to in fact constitutes 5% of RM4.88m. The receipt is annexed and marked 'A1'.
>
> 7 I now display a receipt No 23033 dated 24 May 1991, issued by Messrs Cheong Wai Meng & Van Buerle for the sum of RM178,573.35 and receipt No 23032 dated the same day, for RM81,396.70 also issued by
E the same solicitors, the total amount of which constitutes the second 5% of the purchase price with interest for delayed payment. The two receipts are herewith annexed and marked 'A2' and 'A3' respectively.
>
> 8 These receipts are proof that in fact the purchase price is RM4.88m and not RM3,253,966.85.
>
> 9 I now annex herewith a copy of a letter dated 28 May 1991, issued by
F one Eng Hooi Hwa, the general manager of the plaintiffs, to Mr Maikal Yasu stating that as the sale and purchase transaction had come to an end, he acknowledges the return of the sum of RM244,000. The copy of the said letter is marked 'A4'.
>
> 10 The contents of this letter is in direct contradiction to exhibit 'A2' and
G 'A3' which both constitutes a further 5%, together with interest for delayed payment, of the purchase price.
>
> 11 These receipts in fact confirm that the purchase price was in fact RM4.88m and not as averred by the plaintiffs in the statement of claim.
>
> 12 The letter annexed, ie 'A4', in fact confirms that a conspiracy exists as pleaded in my defence to defraud the third and fifth defendants and
H myself of a certain amount of money.

Encik Manecksha submitted that although he could not point to any specific issue that required a trial, the circumstances surrounding the case called for further investigation at a trial: in the words of O 14 r 3(1), 'there ought for some other reason to be a trial'. In support of his submission, he
I relied on the following passage in the judgment of Megarry J in *Miles v Bull* [1969] 1 QB 258; [1968] 3 All ER 632; [1968] 3 WLR 1090, an authority with which practitioners are quite familiar and which was applied by the High Court of Singapore in *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1 at p 3:

In these circumstances, I think that it is necessary to examine the precise wording of O 14. Under the former O 14 r 1, a defendant could obtain leave to defend if he satisfied the judge that he had a good defence to the action on the merits, or disclose 'such facts as may be deemed sufficient to entitle him to defend the action generally'. I do not see how that can be said to be the case here. The language of O 14 has, however, been changed, and it is the new language that I must apply.

Under rr 3 and 4 of the present O 14, the defendant can obtain leave to defend if (and I read from r 3(1)) the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or, that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine O 14 to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, referred to in the notes to O 14 in the Supreme Court Practice 1967 at p 123, if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under O 14 r 1'. The question is thus whether this is such a case.

I think it is. In my judgment, 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff, but in the circumstances of the case I do not think that it would be just if the plaintiff were able to enforce the rights which he claims without being put to strict proof what they do enable him to evict the defendant. I was told that, in granting leave to defend, Master Jacob said that the case was 'too near the bone for O 14'. That, if I may say so, seems to me to summarize admirably what I have tried to express in greater detail. Order 14 is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

I also bear in mind what Bramwell LJ said in *Harrison v Rottenheim* (1878) 26 WLR 362. Even on the old wording of O 14:

> 'though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O 14, and should not be pursued without his being allowed to defend.'

> Bramwell LJ also referred to the remarkable fact that that action was on a bill of exchange three years old, and so the case was one of a stale claim, a circumstance perhaps matched by the remarkable promptitude of completion in the case before me.

Counsel also criticized the learned judge for failing to undertake a judicial appreciation of the nature of the defence taken. He referred this court to the reliance by the judge on para 4.2 of the defence, and complained that the defence should be read as a whole and together with the affidavit filed in opposition to the summons for judgment.

Now, I am quite satisfied that there is no merit in the arguments advanced by counsel. I also think that the learned judge's reversal of himself in open court was correct. In a carefully considered judgment, the learned judge disposed of what counsel considered to be the several unsatisfactory features that took this case out of the summary jurisdiction. I am entirely in agreement with the views he has expressed. In my judgment, there are several reasons why this appeal should fail.

In the first place, the submission of counsel based on the documentary exhibits completely overlooks the previous aborted transaction between the parties in which Mr Maikal Yasu acted on the instructions of the third defendant. Some of these exhibits relate to the earlier aborted transaction; others to the transaction under the first agreement whereby the said land was sold at an agreed lower price. What the appellants have done is to mix both of these up and on that basis allege a conspiracy to defraud. Each of the several documents has been explained in the affidavit of Eng Hooi Hwa affirmed on 9 June 1994, and filed on the respondent's behalf.

The learned judge appears to have accepted that explanation. Having considered all the circumstances of the case and the relevant evidence adduced, I am unable to disagree with the view formed by the learned judge. As I observed at the outset, it is important to understand the history of the dispute between the parties. Viewed against the background of the events that transpired prior to the execution of the first agreement, the documents relied upon by the appellants do not lend any assurance whatsoever to the charge made by them. It follows that this is not a case that comes within the category that Megarry J had in mind in *Miles v Bull* [1969] 1 QB 258; [1969] 3 All ER 632; [1968] 3 WLR 1090.

Secondly, neither in the defence nor in the affidavit in opposition are there any particulars of the alleged fraud or conspiracy. It is of no consequence that the defence does not condescend to particulars. After all, this was an application under the summary jurisdiction so that there was no obligation on the part of the appellants to even deliver a defence. But the affidavit must do so. The strictness with which this rule as to pleading has to be observed, even in cases coming within the summary procedure, is demonstrated by the decisions in *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1, and *See Hua Daily News Bhd v Tan Thien Chin* [1986] 2 MLJ 107. In the latter case, Mohamed Azmi SCJ when dealing with a charge of fraud raised by a defendant in an application under O 14 said at p 111:

> Having regard to the factual situation in this case, we see no reason to disturb the finding of the learned judge that the allegation of fraud is not only frivolous but also not bona fide. The reasons given by the learned judge for coming to this conclusion are well founded. *Firstly, the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal.* (Emphasis added.)

I think that his Lordship's words are apposite to the present case. Here too, it would appear that the charge of conspiracy to defraud is not made bona fide, and that there are certainly no particulars in support of it.

Lastly, there is a clear admission in para 4.2 of the defence that the price asked for was RM4.8m, and that it had been negotiated down to RM3,253,966.85. It caught the eye of the learned judge, and he formed the view that this really demolished any suggestion that the second agreement was not above board. I am unable to see any error on the part of the learned judge in this respect. Indeed, I am entirely in agreement with the conclusion that one cannot have a conspiracy in the face of that admission. Additionally, there appears to be a contradiction between this paragraph of the defence and the averments in the affidavit which I have set out earlier in this judgment, thereby demonstrating the lack of bona fides on the part of the appellants when they took the point. On the totality of all the evidence presented before the learned judge, I am satisfied that the allegation of a conspiracy to defraud is altogether frivolous and made without any basis. Practitioners must remember that taking a plea of fraud is a serious matter and that no such plea ought to be put on the record in the absence of sufficient material in support.

Having given this matter my most anxious consideration, I came to the conclusion that the judge was entirely correct in the decision he arrived at upon the further argument. There are really no triable issues here. Neither is there any other reason for a trial. As such, the appeal had to be, and was, dismissed with costs. The usual order directing the deposit in court to be paid out to account for the respondent's costs was also made.

16 June 1995

VC George JCA: I have had the benefit of reading the judgments of my brothers, Shaik Daud and Gopal Sri Ram JJCA, with whose views of the matter I am in full agreement. Like them, I am also far from satisfied with what were put up by or on behalf of the defendants as issues to be tried as being bona fide issues. I agree that the appeal should be dismissed with costs here and in the court below.

Appeal dismissed.

Reported by BY Leong